

STATE OF COLORADO

Bill Ritter, Jr., Governor
James B. Martin, Executive Director

Dedicated to protecting and improving the health and environment of the people of Colorado

4300 Cherry Creek Dr. S.
Denver, Colorado 80246-1530
Phone (303) 692-2000
TDD Line (303) 691-7700
Located in Glendale, Colorado

Laboratory Services Division
8100 Lowry Blvd.
Denver, Colorado 80230-6928
(303) 692-3090

<http://www.cdphe.state.co.us>



Colorado Department
of Public Health
and Environment

April 14, 2009

John Rosie, R.A.
FMI Security Commons, LLC
8610 Explorer Drive, Suite 100
Colorado Springs, CO 80920

Certified Mail Number: 7007 0220 0001 0160 6440

RE: Service of Notice of Violation/Cease and Desist Order, Number: SO-090414-2

Dear Mr. Rosie:

FMI Security Commons, LLC is hereby served with the enclosed Notice of Violation / Cease and Desist Order (the "NOV/CDO"). This NOV/CDO is issued by the Colorado Department of Public Health and Environment's Water Quality Control Division (the "Division") pursuant to the authority given to the Division by §§25-8-602 and 25-8-605, C.R.S. of the *Colorado Water Quality Control Act*, (the "Act"). The Division bases this NOV/CDO upon findings that FMI Security Commons, LLC has violated the Act, and/or [COR-03A812] regulations promulgated pursuant to the Act, as described in the enclosed NOV/CDO.

Pursuant to §25-8-603, C.R.S., FMI Security Commons, LLC is required, within thirty (30) calendar days of issuance of this NOV/CDO, to submit to the Division an answer admitting or denying each paragraph of the Findings of Fact and responding to the Notice of Violation.

This action could result in the imposition of civil penalties. The Division is authorized pursuant to §25-8-608, C.R.S. to impose a penalty of \$10,000 per day for each day during which such violation occurs.

Please be advised that the Division is continuing its investigation into this matter and the Division may identify supplementary violations that warrant amendments to this NOV/CDO or the issuance of additional enforcement actions.

Should you or representatives of FMI Security Commons, LLC desire to discuss this matter informally with the Division, or if you have any questions regarding the NOV/CDO, please do not hesitate to contact Danelle Morgan of this office by phone at (303) 692-3176 or by electronic mail at danelle.morgan@state.co.us.

Sincerely,



Kristi-Raye Beaudin, Legal Assistant
Compliance Assurance Section
Enforcement Unit
WATER QUALITY CONTROL DIVISION

cc: El Paso County Department of Health and Environment
MS-3 File

ec: Aaron Urdiales, EPA Region VIII
Tim Vrudny, Engineering Section, CDPHE
Dave Knope, Engineering Section, CDPHE
Dick Parachini, Watershed Program, CDPHE
Gary Beers, Permits Unit, CDPHE
Carolyn Schachterle, OPA

Enclosure(s)



COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT
DIVISION OF ADMINISTRATION
WATER QUALITY CONTROL DIVISION

NOTICE OF VIOLATION / CEASE AND DESIST ORDER

NUMBER: SO-090414-2

IN THE MATTER OF: FMI SECURITY COMMONS, LLC
CDPS PERMIT NO. COR-030000
CERTIFICATION NO. COR-03A812
EL PASO COUNTY, COLORADO

Pursuant to the authority vested in the Colorado Department of Public Health and Environment's (the "Department") Division of Administration by §§25-1-109 and 25-8-302, C.R.S., which authority has been delegated to the Department's Water Quality Control Division (the "Division"), and pursuant to §§25-8-602 and 25-8-605, C.R.S., the Division hereby makes the following Findings of Fact and issues the following Notice of Violation / Cease and Desist Order:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to the alleged violations identified herein, FMI Security Commons, LLC ("FMI") was a Colorado corporation in good standing and registered to conduct business in the State of Colorado.
2. FMI is a "person" as defined under the Water Quality Control Act, §25-8-103(13), C.R.S. and its implementing permit regulation, 5 CCR 1002-61, §61.2(73).
3. On or about October 1, 2006, FMI initiated construction of a multi-family residential development on 7.577 acres of property located at or near the cross streets of Cortez Drive and Hallam Avenue, in or near the Town of Security, El Paso County, Colorado (the "Project").
4. On September 22, 2006, the Division received an application from FMI for Project coverage under the Colorado Discharge Permit System ("CDPS") General Permit, Number COR-030000, for Stormwater Discharges Associated with Construction Activity (the "Permit").
5. On September 26, 2006, the Division provided FMI Certification Number COR-03A812 authorizing FMI to discharge stormwater from the construction activities associated with the Project to Security Creek and Fountain Creek under the terms and conditions of the Permit. Certification Number COR-03A812 became effective September 26, 2006 and remains in effect until it is inactivated at the request of FMI.

6. Security Creek and Fountain Creek are “state waters” as defined by §25-8-103(19), C.R.S. and its implementing permit regulation, 5 CCR 1002-61, §61.2 (102).
7. Pursuant to 5 CCR 1002-61, §61.8, a permittee must comply with all the terms and conditions of a permit and violators of the terms and conditions specified in a permit may be subject to civil and criminal liability pursuant to §§25-8-601 through 612, C.R.S.
8. On April 17, 2007, a representative from PG Environmental, LLC (the “Inspector”) conducted an on-site inspection of the Project on behalf of the Division, pursuant to the Division’s authority under §25-8-306, C.R.S., to determine FMI’s compliance with the Water Quality Control Act and the Permit. During the inspection, the Inspector interviewed Project representatives, reviewed the Project’s stormwater management system records, and performed a physical inspection of the Project.

Deficient and/or Incomplete Stormwater Management Plan

9. Pursuant to Part I. B. of the Permit, FMI is required to prepare and maintain a Stormwater Management Plan (“SWMP”) that identified Best Management Practices (“BMPs”) that, when implemented, would meet the terms and conditions of the Permit. The SWMP is required to identify potential sources of pollution, which may be reasonably expected to affect the quality of stormwater discharges associated with construction activity from the Project. In addition, the plan is required to describe and ensure the implementation of BMPs, which would be used to reduce the pollutants in stormwater discharges associated with construction activity.
10. Pursuant to Part I. B. of the Permit, each project’s SWMP shall include, at a minimum, the following items:
 - a. Site Description - Each plan shall provide a description of the following:
 - i. A description of the construction activity.
 - ii. The proposed sequence for major activities.
 - iii. Estimates of the total area of the site, and the area of the site that is expected to undergo clearing, excavation or grading.
 - iv. An estimate of the runoff coefficient of the site before and after construction activities are completed and any existing data describing the soil, soil erosion potential or the quality of any discharge from the site.
 - v. A description of the existing vegetation at the site and an estimate of the percent vegetative ground cover.
 - vi. The location and description of any other potential pollution sources, such as vehicle fueling, storage of fertilizers or chemicals, etc.
 - vii. The location and description of any anticipated non-stormwater components of the discharge, such as springs and landscape irrigation return flow.
 - viii. The name of the receiving water(s) and the size, type and location of any outfall or, if the discharge is to a municipal separate storm sewer, the name of that system, the location of the storm sewer discharge, and the ultimate receiving water(s).
 - b. Site Map - Each plan shall provide a generalized site map or maps which indicate:
 - i. Construction site boundaries.

- ii. All areas of soil disturbance.
- iii. Areas of cut and fill.
- iv. Areas used for storage of building materials, soils or wastes.
- v. Location of any dedicated asphalt or concrete batch plants.
- vi. Location of major erosion control facilities or structures.
- vii. Springs, streams, wetlands and other surface waters.
- viii. Boundaries of 100-year flood plains, if determined.

c. BMPs for Stormwater Pollution Prevention - The plan shall include a narrative description of appropriate controls and measures that will be implemented before and during construction activities at the facility.

- i. Erosion and Sediment Controls - A description of structural site management controls (Structural Practices) which will minimize erosion and sediment transport and a description of interim and permanent stabilization practices (Non-Structural Practices), including the site-specific scheduling of the implementation of the practices.
- ii. Phased BMP Implementation-The SWMP shall clearly describe the relationship between the phases of construction and the implementation and maintenance of BMP's.
- iii. Material Handling and Spill Prevention - The SWMP shall identify any procedures or significant materials handled at the site that could contribute pollutants to runoff.
- iv. Dedicated Concrete or Asphalt Batch Plants – The SWMP shall clearly describe and locate BMPs to control stormwater pollution from dedicated concrete batch plants or dedicated asphalt batch plants.

d. Final Stabilization and Long-Term Stormwater Management - Description of the measures used to achieve final stabilization and measures to control pollutants in stormwater discharges that will occur after construction operations have been completed.

e. Other Controls - Description of other measures to control pollutants in stormwater discharges, including plans for waste disposal and limiting off-site soil tracking.

f. Inspection and Maintenance - Description of procedures to inspect and maintain in good and effective operating condition the vegetation, erosion and sediment control measures and other protective measures identified in the SWMP.

11. The Division has determined that FMI failed to prepare and maintain a complete and accurate SWMP for the Project, as described in paragraphs 11(a-f) below:

a. During the April 17, 2007 inspection, the inspector reviewed the Project's SWMP and identified that the section in the SWMP on Site Description was addressed but did not identify all locations and descriptions of other potential pollution sources identified for the project as required by Part I.B.1.f of the permit. For example, as provided by Randy Tate, Field Manager, Silver Ridge Development, a mobile fueling vehicle is used to fuel machinery used on site, but this practice was not identified as potential pollutant sources in the Site Description.

b. During the April 17, 2007 inspection, the inspector reviewed the Project's SWMP and identified

that the Site Map did not identify the construction site boundaries as required by Part I.B.2 of the permit. For example, silt fence was identified encompassing the perimeter of the site, but is not representative of the construction site boundary.

- c. During the April 17, 2007 inspection, the inspector reviewed the Project's SWMP and identified that the Site Map did not clearly identify all areas of soil disturbance. Specifically, the Site Map did not depict that the entire site would be exposed at the time of inspection.
- d. During the April 17, 2007 inspection, the inspector reviewed the Project's SWMP and identified that the Site Map did not identify all areas used for storage of building materials, soils or wastes as required by Part I.B.2 of the permit. Specifically, the Site Map did not include the staging area/trailer associated with construction activities or the soil stockpile near the intersection of Red Pass Point and Silver Star Grove.
- e. During the April 17, 2007 inspection, the inspector reviewed the Project's SWMP and identified that the Site Map did not identify the location of areas used for wastes as required by Part I.B.2 of the permit. Specifically, the Site Map did not indicate the concrete washout located in the center of the construction site.
- f. During the April 17, 2007 inspection, the inspector reviewed the Project's SWMP and identified that the section in the SWMP on BMPs for Stormwater Pollution Prevention did not identify procedures or significant materials that could contribute pollutants to runoff. For example, the mobile fueling source to fuel machinery used on site was not identified as potential pollutant sources.

Failure to Implement and/or Maintain
Best Management Practices to Protect Stormwater Runoff

- 12. Pursuant to Part I. B. 3. a. (1) of the Permit, FMI is required to minimize erosion and sediment transport from the Project. The Permit specifies that structural site management practices may include, but are not limited to: straw bales, silt fences, earth dikes, drainage swales, sediment traps, subsurface drains, inlet protection, outlet protection, gabions, and temporary or permanent sediment basins.
- 13. Pursuant to Part I. B. 3. a. (2) of the Permit, FMI is required to implement interim and permanent stabilization practices, including site-specific scheduling of the implementation of the practices. The Permit specifies that site plans should ensure existing vegetation is preserved where possible and that disturbed areas are stabilized. The Permit specifies that non-structural practices may include, but are not limited to: temporary seeding, permanent seeding, mulching, geotextiles, sod stabilization, vegetative buffer strips, protection of trees and preservation of mature vegetation.
- 14. The Division has determined that FMI failed to implement and/or maintain functional BMPs at the Project as described in paragraphs 14(a-d) below:
 - a. During the May 17, 2007 inspection, the Inspector observed that BMPs were not implemented to prevent the discharge of sediment into a western flowing drainage canal along the western perimeter of the construction site. As provided by Larry Syslo, Inspection Supervisor, El Paso

County, the drainage canal ultimately discharges to Fountain Creek (State waters.) As provided by Randy Tate, Field Manager, Silver Ridge Development, this water was being drained from a low-lying area near the center of the construction site via a submerged, four- inch diameter pipe. As a result, a visible discharge of sediment into the drainage canal was observed.

- b. During the April 17, 2007 inspection, the Inspector observed that BMPs were not implemented to prevent the discharge of sediment to the western flowing drainage canal along the western perimeter of the construction site. As provided by Larry Syslo, Inspection Supervisor, El Paso County, the drainage canal ultimately discharges to Fountain Creek (State water.) Specifically, BMPs were not installed to prevent the discharge of sediment from an expanse of disturbed land via a curb and gutter system leading to the drainage canal. As a result there was a potential for the discharge of sediment to the drainage canal.
 - c. During the April 17, 2007 inspection, the Inspector observed that BMPs were not properly maintained at the vehicle tracking control pad, located at the construction trailer entrance off of Cortez Drive. Sediment was visible in the rock pad and the rock had become thin and sparse. As a result, there was a potential for sediment to be transported to Cortez Drive.
 - d. During the April 17, 2007 inspection, the Inspector observed that BMPs were not adequately maintained at the northeastern corner of the construction site. Specifically, sediment and debris had accumulated to half the exposed silt fence height. As a result, there was a potential for the discharge of sediment from this location to Cortez Drive.
15. FMI's failure to implement and maintain functional BMPs to protect stormwater quality during construction activities at the Project constitutes violations of Part I. B. 3. a. of the Permit.

Failure to Conduct Inspections of Stormwater Management System

16. Pursuant to Part I. C. 5. a. of the Permit, for active sites where construction has not been completed, FMI is required to make thorough inspections of its stormwater management systems at least every 14 days and after any precipitation or snowmelt event that causes surface erosion.
17. Pursuant to Part I. C. 5. b. of the Permit, for sites where all construction activities are completed but final stabilization has not been achieved, FMI is required to make thorough inspections of its stormwater management systems at least once every month.
18. The Division has determined that FMI failed to properly conduct inspections of its stormwater management systems at the projects described in paragraphs 18(a) below:
- a. During the April 17, 2007 inspection of the project, the Inspector reviewed the stormwater management system inspection records and found them to be inadequate as they were not conducted at the required frequency specified in Part I.C.5 of the Permit. Inspection records were not available from December 6, 2006 to March 5, 2007, or eighty-nine (89) days.
19. FMI's failure to conduct inspections of the Project's stormwater management system in accordance with the provisions of the Permit constitutes violations of Part I. C. 5. a. of the Permit.

NOTICE OF VIOLATION

20. Based on the foregoing Findings of Fact and Conclusions of Law, you are hereby notified that the Division has determined that FMI has violated the following sections of the Colorado Water Quality Control Act's implementing permit regulations.

Part I. B. of the Permit, which states in part, "The SWMP shall be prepared in accordance with good engineering, hydrologic and pollution control practices. The main objective of the plan shall be to identify Best Management Practices (BMPs) which when implemented will meet the terms and conditions of this permit. The plan shall identify potential sources of pollution (including sediment) which may be reasonably expected to affect the quality of stormwater discharges associated with construction activity from the facility. In addition, the plan shall describe and ensure the implementation of BMPs which will be used to reduce the pollutants in stormwater discharges associated with construction activity. Construction operations must implement the provisions of the SWMP required under this part as a condition of this permit."

Part I. B. 3. a. of the Permit, which outlines in part that BMPs for Stormwater Pollution Prevention shall address erosion and sediment controls, including "structural site management practices which will minimize erosion and sediment transport," and "interim and permanent stabilization practices, including site specific scheduling of the implementation of the practices. Site plans should ensure that existing vegetation is preserved where possible and that disturbed areas are stabilized."

Part I. C. 5. a. of the Permit, which states in part, "For active sites where construction has not been completed, the permittee shall make a thorough inspection of their stormwater management system at least every 14 days and after any precipitation or snowmelt event that causes surface erosion."

REQUIRED CORRECTIVE ACTION

Based upon the foregoing factual and legal determinations and pursuant to §25-8-602 and §25-8-605, C.R.S., FMI is hereby ordered to:

21. Cease and desist from all violations of the Colorado Water Quality Control Act, §§25-8-101 through 25-8-703, C.R.S., its implementing regulations promulgated thereto and the Permit.

Furthermore, the Division hereby orders FMI to comply with the following specific terms and conditions of this Order:

22. FMI shall immediately evaluate the Project's SWMP and implement necessary measures to ensure that the SWMP contains all of the elements required by the current version of the Permit and is effective in managing stormwater and pollutant discharges from the Project. Within thirty (30) calendar days of receipt of this Order, FMI shall submit to the Division a written certification stating that a complete, effective and up-to-date SWMP has been fully developed and implemented at the Project.
23. FMI shall immediately implement necessary measures to ensure that adequate BMPs are in place to control stormwater and pollutant discharges from the Project. Within thirty (30) calendar days of receipt

of this Order, FMI shall evaluate and modify all existing BMPs at the Project to ensure the BMPs meet the design requirements specified in the Project's complete and up-to-date SWMP. Within thirty (30) calendar days of receipt of this Order, FMI shall submit photographs to the Division documenting the current conditions and the associated BMPs implemented at the Project.

24. FMI shall immediately begin conducting inspections of the Project's stormwater management system in accordance with the provisions outlined in the Permit. Within thirty (30) calendar days of receipt of this Order, FMI shall submit to the Division a written certification stating that all such inspections are being conducted and recorded in compliance with the terms and conditions of the Permit.
25. Within thirty (30) calendar days of receipt of this Order, FMI shall submit to the Division a detailed written statement outlining the standard procedures FMI will undertake to ensure that functional stormwater management systems are fully implemented at its Colorado construction sites.

NOTICES AND SUBMITTALS

For all documents, plans, records, reports and replies required to be submitted by this Notice of Violation/Cease and Desist Order, FMI shall submit an original and an electronic copy to the Division at the following address:

Colorado Department of Public Health and Environment
Water Quality Control Division / WQCD-B2
Compliance Assurance and Data Management Section
Attention: Danelle Morgan
4300 Cherry Creek Drive South
Denver, Colorado 80246-1530
danelle.morgan@state.co.us

For any person submitting documents, plans, records and reports pursuant to this Notice of Violation / Cease and Desist Order, that person shall make the following certification with each submittal:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

OBLIGATION TO ANSWER AND REQUEST FOR HEARING

Pursuant to §25-8-603, C.R.S. and 5 CCR 1002, §21.11 you are required to submit to the Division an answer affirming or denying each paragraph of the Findings of Fact and responding to the Notice of Violation. The answer shall be filed no later than thirty (30) calendar days after receipt of this action.

Section 25-8-603, C.R.S. and 5 CCR 1002, §21.11 also provide that the recipient of a Notice of Violation may request the Division to conduct a public hearing to determine the validity of the Notice, including the Findings of Fact. Such request shall be filed in writing with the Division and include the information specified in 5 CCR 1002, §21.4(B)(2). Absent a request for hearing, the validity of the factual allegations and the Notice of Violation shall be deemed established in any subsequent Department proceeding. The request for hearing, if any, shall be filed no later than thirty (30) calendar days after issuance of this action. The filing of an answer does not constitute a request for hearing.

FALSIFICATION AND TAMPERING

Be advised, in accord with §25-8-610, C.R.S., that any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Colorado Water Quality Control Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than ten thousand dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

POTENTIAL CIVIL AND CRIMINAL PENALTIES

You are also advised that any person who violates any provision of the Colorado Water Quality Control Act (the "Act"), §§25-8-101 to 703, C.R.S., or of any permit issued under the Act, or any control regulation promulgated pursuant to the Act, or any final cease and desist order or clean-up order issued by the Division shall be subject to a civil penalty of not more than ten thousand dollars per day for each day during which such violation occurs. Further, any person who recklessly, knowingly, intentionally, or with criminal negligence discharges any pollutant into any state waters commits criminal pollution if such discharge is made without a permit, if a permit is required by the Act for such discharge, or if such discharge is made in violation of any permit issued under the Act or in violation of any Cease and Desist Order or Clean-up Order issued by the Division. By virtue of issuing this Notice of Violation / Cease and Desist Order, the State has not waived its right to bring an action for penalties under §§25-8-608 and 609, C.R.S., and may bring such action in the future.

RELEASE OR DISCHARGE NOTIFICATION

Pursuant to §25-8-601, C.R.S., you are further advised that any person engaged in any operation or activity which results in a spill or discharge of oil or other substance which may cause pollution of the waters of the state, shall notify the Division of the discharge. If said person fails to so notify, said person is guilty of a misdemeanor, and may be fined or imprisoned or both.


EFFECT OF ORDER

Nothing herein contained, particularly those portions requiring certain acts to be performed within a certain time, shall be construed as a permit or license, either to violate any provisions of the public health laws and regulations promulgated thereunder, or to make any discharge into state waters. Nothing herein contained shall be construed to preclude other individuals, cities, towns, counties, or duly constituted political subdivisions of the state from the exercise of their respective rights to suppress nuisances or to preclude any other lawful actions by such entities or the State.

For further clarification of your rights and obligations under this Notice of Violation / Cease and Desist Order you are advised to consult the Colorado Water Quality Control Act, §§25-8-101 to 703, C.R.S., and regulations promulgated thereunder, 5 CCR 1002.

Issued at Denver, Colorado, this 14th day of April, 2009.

FOR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT



Lori M. Gerzina, Section Manager
Compliance Assurance Section
WATER QUALITY CONTROL DIVISION